IN THE SUPREME COURT OF IOWA

No.: 22-0471

Polk County No. CVCV 061324

MID AMERICAN CONSTRUCTION LLC and GRINNELL MUTUAL,
Petitioner-Appellants,

v.

MARSHALL SANDLIN,
Respondents-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. SCOTT D. ROSENBERG, JUDGE

PETITIONERS-APPELLANTS' RESISTANCE TO RESPONDENT-APPELLEE'S APPLICATION FOR FURTHER REVIEW OF THE IOWA COURT OF APPEALS DECISION FILED FEBRUARY 22, 2023

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RESISTANCE TO APPLICATION FOR FURTHER REVIEW

The first asserted ground for the Iowa Supreme Court to take further review of the decision of the Iowa Court of Appeals is that the decision is in conflict with Iowa Supreme Court precedent. However, there is no conflict with prior precedent from the Iowa Supreme Court. The issue presented in this matter involved the interpretation of amendments to *Iowa Code* § 85.39 which now define by statute what a reasonable fee for an examination will be measured against. The agency findings did not address the issue presented by the new statutory amendments in assessing what would be reasonable. Therefore, there is no conflict with *Larson Mfg. Co., Inc. v. Thorson*, 763 N.W.2d 842 (Iowa 2009) as the issue is not one of substantial evidence, but of statutory interpretation. The Court of Appeals appropriately addressed the new statutory language, and reversed the agency in finding the examination fee reasonable.

The final ground advanced to take further review is twofold. The first argument is that the Court of Appeals decided an issue where there is an important question of changing legal principals. *Iowa R. App. P.* 6.1103(1)(b)(3). However this is incorrect. The change occurred due to legislative action to amend *Iowa Code* § 85.39 to now address what will be considered a reasonable fee for an examination. While there is a change to

the law, it is statutory and involves the legislature adding a statutory definition of a term in the statute. This is not a changing legal principal in the case law of the Iowa Supreme Court.

The second argument of the final ground advanced by the Appellee for further review is that this case presents an issue of broad public importance that the Iowa Supreme Court should ultimately decide. *Iowa R. App. P.* 6.1103(1)(b)(4). This case involves interpretation of amendments to *Iowa Code* § 85.39 defining what is reasonable for purposes of reimbursement of an exam. The issue is a narrow one, and deals with the costs of an exam under *Iowa Code* § 85.39. The amendment to the *Iowa Code* is clear in its terms, and the Court of Appeals appropriately addressed the clear statutory language.

STATEMENT OF FACTS

The majority of the facts recited by the Appellee appear to be of minimal relevance to the sole issue regarding the reimbursement for Dr. Taylor's exam and addressing the amendments to *Iowa Code* § 85.39. While there is a dispute as to how the Claimant came to see Dr. Kennedy, the facts pertinent to the assessment of the reasonableness of the fee for Dr. Taylor's exam are fairly straight forward.

The Claimant suffered a stipulated work injury to his left foot on September 6, 2017. (Hearing Report; App. p. 6). The Claimant testified that

he picked up his tools and went to see the Employer after the incident occurred, and was told to go home and ice his foot. (Hrg. Tr. pp. 23-24, lines 10-21; App. pp. 91-92).

The Claimant himself chose treatment at Medical Associates where he had previously gone for personal health care. (Hrg. Tr. pp. 25, lines 8-12; App. p. 93; pp. 38-41, lines 22-17; App. pp. 99-102; Ex. G, Depo. p. 9, lines 3-8; App. p. 84). The Claimant considered Medical Associates to be his personal family doctors. (Ex. G, Depo. p. 9, lines 3-8; App. p. 84).

The Claimant saw Dr. Isaak at Medical Associates on September 9, 2017. (Jt. Ex. 2, p. 4; App. p. 57). Dr. Isaak reviewed x-rays and was suspicious of a finding at the base of the fifth metatarsal which was suggestive of a fracture. (Jt. Ex. 2, p. 4; App. p. 57). Dr. Isaak made a referral to podiatry at Medical Associates for a suspected fifth metatarsal fracture. (Jt. Ex. 2, p. 5; App. p. 58).

The Claimant was seen by Dr. Hughes on referral from Dr. Isaak for his left foot injury on September 13, 2017. (Jt. Ex. 3, p. 11; App. p. 63). The doctor advised the Claimant that the fracture would take a minimum of six weeks to heal. (Jt. Ex. 3, p. 11; App. p. 63). Dr. Hughes indicates that she sent the Claimant to Dr. Kennedy at Occupational Medicine as she does not perform permanent impairment ratings, and her normal process is to refer

patients for such purposes. (Ex. A, p. 1; App. p. 78). Dr. Kennedy has confirmed that her clinic is part of the Medical Associates network, as a joint venture between Medical Associates and Mercy Hospital. (Jt. Ex. 5, p. 21; App. p. 68). Dr. Kennedy has also confirmed that Dr. Hughes requested that she perform the impairment rating as Dr. Hughes does not perform impairment ratings. (Jt. Ex. 5, p. 22; App. p. 69).

Dr. Kennedy performed an examination to provide an impairment rating, and her charge for the examination was $174.25. (Def. Ex. C, p. 1). Dr. Kennedy placed Claimant at maximum medical improvement and assigned a 0% impairment rating. (Jt. Ex. 4, p. 19, App. P. 67). Dr. Taylor performed a § 85.39 examination and offered opinions on numerous other issues beyond a simple impairment rating, including a discussion of causation, restrictions, and maximum medical improvement. (Ex. 1). Medix (Dr. Taylor's clinic) has a fee schedule that indicates that $500.00 is the fee charged to perform a functional impairment rating of one body part. (Def. Ex. E, p. 1; App. p. 80).

BRIEF POINT I

THE COURT OF APPEALS WAS CORRECT IN ASSESSING THE REASONABLENESS OF THE CLAIMANT'S IOWA CODE § 85.39 EXAM.

ARGUMENT

The Claimant argues for a much more deferential review under his first issue. The Claimant argues the issue in this case is one of substantial evidence, but this is clearly incorrect. This case involves interpretation of statutory language and will be reviewed for errors of law. This case falls under the new 2017 version of *Iowa Code* § 85.39. There is no dispute that the amendments apply to this case. *Iowa Code* § 85.39 specifically provides that only the "reasonable" costs associated with an examination for an "impairment rating" are to be reimbursed. *The Code* now says "[a] determination of the reasonableness of a fee for an examination made pursuant to this subsection, shall be based on the typical fee charged by a medical provider to perform an impairment rating in the local area where the examination occurred". *Iowa Code* § 85.39(2) (Emphasis added). It is clear that the Legislature modified *Iowa Code* § 85.39 to limit the amount of fees that could be reimbursed for *Iowa Code* § 85.39 medical examinations. The limitation is the actual cost of performing an impairment rating. This is not the same as the costs of an "independent medical examination" as the *Code* only states the charge is to be that of a medical provider to perform an impairment rating alone. *Iowa Code* § 85.39 does not cover additional costs to provide other opinions beyond impairment or even necessitate reviewing a great deal of records. This particular issue of statutory interpretation is the

starting point for reviewing the issue of the reimbursement for Dr. Taylor's exam.

Addressing the issue will require that the Court first engage in statutory interpretation of the new provisions of *Iowa Code* § 85.39. This will determine what facts are pertinent to the issue, and will be necessary to apply the facts to the applicable law. Specifically the Court will need to address the new statutory definition of what is reasonable for a fee for an *Iowa Code* § 85.39 exam. This is precisely what the Court of Appeals did in addressing this issue. This is where the District Court and the Agency missed the issue by essentially addressing reasonableness of an exam fee as had always been done in the past without addressing the new statutory definition of the term. Essentially they ignored the amendment making the new language meaningless. It appears the Claimant is guilty of the same omission in his argument for further review.

In reviewing statutory interpretation this Court will review for corrections of errors of law. *Wilson v. IBP, Inc.*, 589 N.W.2d 729, 730 (Iowa 1999). The Legislature has not vested in the Workers' Compensation Commissioner authority to interpret the statutes, and the review of the Iowa Workers' Compensation Act and the interpretation of the statutes will be for errors of law. *Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 768-769 (Iowa

2016). In interpreting the Iowa Workers' Compensation Act, the goal is to determine and effectuate the Legislature's intent. *Id.* (citing *United Fire & Casualty Co. v. St. Paul Fire & Marine Insurance Co.*, 667 N.W.2d 755, 759 (Iowa 2004). *Id.* at 770. To determine the legislative intent, the Court will look to the language chosen by the Legislature and not at what the Legislature might have said. *Id.* (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)). Absent statutory definition, the Court will consider statutory terms in their context and give them their ordinary and common meaning. *Id.* (citing *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 235 (Iowa 2010)). If the statutory language is ambiguous, the words are to be reviewed in the statute as a whole to produce a harmonious result. *Id.* The Court will also presume that the Legislature included every part of the statute for a purpose, and will avoid any statutory construction that would make any portion redundant or irrelevant. *Id.* The Court will also avoid construing the statute in a way that will lead to an absurd result. *Id.* The Iowa Supreme Court has held that when the Legislature amends a statute it will be presumed that it was intended to change the law. *Chavez v. MS Technology LLC*, 972 N.W.2d 662-670 (Iowa 2022) (citing *Colwell v. Iowa Dep't of Hum. Servs.*, 923 N.W.2d 225, 235 (Iowa 2019)).

The new statute is clear that what is provided for in *Iowa Code* § 85.39 is not an independent medical examination which could touch on issues beyond an impairment rating such as causation, diagnosis, treatment, restrictions, maximum medical improvement in addition to an impairment rating. It is clear that the Legislature has chosen to limit the scope of an evaluation in enacting amendments to *Iowa Code* § 85.39, and the specific limitation is to define a reasonable fee that may be reimbursed as the cost to perform an "impairment rating". The *Code* does not include any additional opinions. In other words *Iowa Code* § 85.39 no longer allows reimbursement for a full independent medical examination. The Legislature could have stated that the reasonable cost was that of performing an "independent medical examination", but chose to specify that it was the cost to perform an "impairment rating". This is precisely what was held by the Court of Appeals, and it is from here that the facts must be assessed.

The only evidence in the record as to the costs to perform an impairment rating are Dr. Kennedy's own charges, and the fee schedule from Medix. The Court of Appeals ultimately decided that the $500.00 from the fee schedule of Medix to perform an impairment rating for one body part would be the reasonable fee under the statute as amended. This would be Dr. Taylor's own clinic's stated charge to perform an impairment rating alone. Therefore, it is

clear that there is no conflict with prior Iowa Supreme Court precedent, and the Court of Appeals appropriately examined the issue based upon the interpretation of the statutory amendment at issue. This is not a factual issue on which any deference will be given to the Agency, but a matter of interpretation of statute.

BRIEF POINT II

THE COURT OF APPEALS WAS CORRECT IN INTERPRETING IOWA LAW AND IOWA CODE § 85.39 TO LIMIT THE REASONABLE REIMBURSEMENT TO THE CHARGES TO PERFORM AN IMPAIRMENT RATING.

ARGUMENT

As argued in the foregoing, this case involves an issue of statutory interpretation. As such, under the appropriate interpretation of *Iowa Code* § 85.39 the Claimant would be limited in what could be reimbursed as the reasonable costs of his examination to the costs to perform a functional impairment rating. The Claimant requested Dr. Taylor do a full independent medical examination including giving numerous opinions beyond just an impairment rating. An impairment rating would typically only involve measurements, or a diagnosis based evaluation under the *AMA Guides to the Evaluation of Permanent Impairment 5th Ed.* An impairment rating evaluation does not require the additional evaluations and/or analysis that might be necessary, or the review of additional records, to give opinions on

causation, permanent restrictions, additional treatment, maximum medical improvement or a myriad of other issues beyond a functional impairment rating. While these additional opinions certainly would be desirable and beneficial to the Claimant at hearing, the Legislature has chosen to limit the reimbursable costs associated with an *Iowa Code* § 85.39 examination to just the cost of performing an impairment rating. This does not mean that an injured worker cannot get these opinions, but that they must pay for those opinions beyond the cost to perform a rating.

Merely because an evaluation might also include an impairment rating, does not mean that under the *Code* the employer and its insurance carrier would be responsible for all the additional costs, analysis, examination, and review of records necessary to render numerous additional medical opinions. All that would be reimbursable under *Iowa Code* § 85.39 are the costs associated with the examination needed to give an impairment rating: The sole item that is considered to be the reasonable costs on *Iowa Code* § 85.39 exam.

The amended language of the statute is clear, and unambiguous. *Iowa Code* § 85.39(2) is only triggered in response to an impairment rating, and now additionally only provides for the reimbursement of the costs of obtaining an impairment rating from a different physician. The Iowa Supreme Court

has already determined that a statute dealing with costs is to be strictly construed. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 151 (Iowa 1992). The 2017 amendments to *Iowa Code* 85.39 had to mean something. The Workers' Compensation Commissioner and the District Court ignored the amendments and misinterpreted the statute. Essentially, the interpretation of the District Court and the Commissioner ignores the basic tenet of statutory construction that it is presumed when a statute is amended the Legislature intended to change the law. Both the Commissioner and the District Court merely did what had always been done, and found that the reimbursement could be for opinions far beyond a rating.

The Claimant has argued that reasonableness was always part of *Iowa Code* § 85.39. While it is true that the *Code* did provide that the injured worker would be reimbursed "the reasonable fee for a subsequent examination by a physician of the employee's own choice", the *Code* now goes on to specifically define what will be reasonable. *Iowa Code* § 85.39(2). As argued in the foregoing, the 2017 Amendment has to mean something, and it clearly does not provide for an independent medical examination. The reasonable costs are to perform an impairment rating. The Iowa Legislature specifically chose to limit the language to the cost of performing an impairment rating. If reasonable still means what it has all along, then there was no need for the

Iowa Legislature to include additional language specifically defining the term. In interpreting a statute, effect must be given to all of the language so that none of it becomes superfluous. *Trujillo V. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016). What the Claimant is arguing for is that this language is superfluous as it does nothing. The law would remain as it always has. If that was what was intended, there would have been no need to include the more limited definition of reasonable now in the *Iowa Code*.

The statute originally stated that "[i]f an evaluation of permanent disability has been made by a physician retained by the employer" that the injured worker would be able to have an evaluation with a physician of their choice. *Iowa Code* § 85.39(2). This defined the triggering factor to get an examination. What it meant is that a rating would have to be provided for permanent disability by a physician chosen by the employer and its insurance carrier. In defining what the reasonable costs are, the Legislature chose to limit what could be a compensable examination under *Iowa Code* § 85.39 to the costs of performing an impairment rating. This makes it consistent with the triggering factor to get the exam in the first place. This interpretation leads to a harmonious result with the rest of the statute.

The *Code* now also limits an *Iowa Code* § 85.39 examination only to situations where the injury for which the worker is being examined is

determined to be compensable. *Iowa Code* § 85.39(2). Thus, if the injury being evaluated ends up not being a compensable one, the Claimant would receive nothing under *Iowa Code* § 85.39. This further supports an interpretation that in 2017 the Legislature sought to limit what would be compensable under *Iowa Code* § 85.39. Not only to limit the reimbursement for expenses under *Iowa Code* § 85.39 only to compensable injuries, but also only to an impairment rating. If the injured worker is seeking a full independent medical examination, it would touch upon, at least potentially, issues such as the causal connection between the alleged injury or condition and the injured worker's employment. If the alleged condition ends up not being compensable, the injured worker would not have gotten anything under *Iowa Code* § 85.39 to pay for the examination. This would even be the case in the eventuality that a rating was authored by an employer retained physician. This is a departure from the law as it stood previous. Under prior case law a rating from a physician retained by the employer and its insurance carrier was all that was necessary to trigger *Iowa Code* § 85.39 before the 2017 Amendments. *Dodd v Fleetguard, Inc.,* 759 N.W. 2d 133, 139-140 (Iowa App. 2008). All of this read together with the original *Iowa Code* § 85.39(2) only further shows that the Legislature in 2017 intended to limit what is included in the scope of an examination under *Iowa Code* § 85.39(2). The

Legislature clearly was changing the law to limit examinations under *Iowa Code* § 85.39

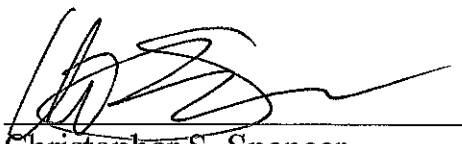
Nothing could be clearer in the language that the reasonable costs are now limited only to performing an impairment rating. The *Code* does not state that it is to perform an independent medical examination, to obtain opinions on causation, restrictions, maximum medical improvement or any other issue that would be beneficial to the Claimant's case. The *Code* specifically states that the reasonable cost is only to perform an impairment rating. The *Code* is clear and unambiguous about what is specified. This is consistent with the other language in the statute, and the other new amendments to *Iowa Code* § 85.39. In short, the Claimant wants to argue for business as usual and ignore the new statutory language. However, the law is clear that language in the statute should not be read to be superfluous, and that this language should mean something. The language is clear by its own terms what it means.

CONCLUSION

For the reasons stated, the Appellee's Application for Further Review should be denied and the decision of the Court of Appeals interpreting *Iowa Code* § 85.39, and limiting the Claimant's reimbursement to the costs to perform an impairment rating ($500.00) should be allowed to stand.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of *Iowa Rs. App. P.* 6.903(1)(d) and 6.903(1)(g)(1) or (2) because it has been prepared in a proportionally spaced typeface using Time New Roman in 14 point font and contains 3260 words, excluding the parts of the brief exempted by *Iowa R. App. P.* 6.903(1)(g)(1).

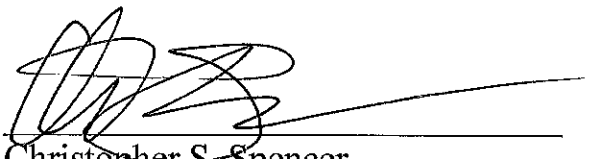


Christopher S. Spencer

3/23/2023
Date

CERTIFICATE OF SERVICE

I, Christopher S. Spencer, member of the Bar of Iowa, hereby certify that on March 23, 2023, I or a person acting on my behalf served the above Petitioners-Apellants' Resistance to Application for Further Review to the Respondent-Appellee's attorneys of record, Zeke R. McCartney, via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.



Christopher S. Spencer

CERTIFICATE OF FILING

I, Christopher S. Spencer, hereby certify that I, or a person acting in my direction, did file the attached Petitioner-Appellants' Resistance to Application for Further Review upon the Clerk of the Iowa Supreme Court via EDMS on this 23rd day of March, 2023.

Christopher S. Spencer

ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of producing the foregoing Petitioner-Appellants' Resistance to Application for Further Review was $0 because of service and filing via EDMS.

Christopher S. Spencer